Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties) (Petition 427 of 2019) [2020] KEHC 8779 (KLR) (Constitutional and Human Rights) (6 February 2020) (Judgment)

David Kariuki Ngari & another v Judicial Service Commission & another; Law Society of Kenya & 2 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 8779 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 427 OF 2019

LA ACHODE, JA MAKAU & EC MWITA, JJ

FEBRUARY 6, 2020

BETWEEN

DAVID KARIUKI NGARI ..... 1ST PETITIONER

INTERNATIONAL ECONOMIC LAW CENTRE ..... 2ND PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY

CABINET SECRETARY, NATIONAL TREASURY AND PLANNING ..... INTERESTED PARTY

JUDGMENT

Introduction

1. Vide Kenya Gazette Notices No. 1420, 1421 and 1422 of 15th February, 2019 respectively, the Judicial Service Commission, (JSC) the 1st Respondent , advertised vacancies in the offices of the Judge of the Court of Appeal, Judge of the Environment and Land Court (ELC) and Judge of the Employment

and Labour Relations Court, (ELRC). It called for applications from suitably qualified persons and conducted recruitment processes to fill the vacancies in the respective offices.

2. The 1st Respondent recommended 11 persons for appointment to the office of Judge of the Court of Appeal, and forwarded their names to the President on 23rd July, 2019. Subsequently, on 13th August, 2019, the 1st Respondent recommended 20 persons and another 10 for appointment to the office of Judge of the ELC and the ELRC respectively.

3. The issues at the centre of this petition, relate to the process employed by the 1st Respondent in arriving at the names of the persons recommended for appointment as Judges of the respective courts, and the post-appointment process, namely; whether the President's power on appointment of Judges under Article 166 of the Constitution, is merely ceremonial; or whether, the President can decline to appoint, and provide written reasons on his decision, under Article 135 of the Constitution.

The Petitioners' Case

4. David Kariuki Ngari, the 1st Petitioner, is a Kenyan citizen, while International Economic Law Centre, the 2nd Petitioner, is a Company limited by guarantee, registered in Kenya. The Petitioners argue that before publishing Gazette Notice Nos. 1420, 1421 and 1422 of 15th February, 2019, the 1st Respondent failed to accord the public, the 1st, 2nd and 3rd Interested Parties and other stakeholders, an opportunity for public participation, contrary to Article 10 of the Constitution.

5. The Petitioners further state, that the 41 Judges recommended by the 1st Respondent for appointment comprise an aggregate of 64 percent increase in the offices of Judge of the respective courts, which is not sustainable and does not offer tangible improvement in access to and delivery of justice to the People of Kenya. They accuse the 1st Respondent of failing and neglecting to conduct a needs assessment to determine the optimal number of judges needed for the respective offices in violation of Articles 10, 172, and 201 of the Constitution, section 4(b) of the Court of Appeal (Organization and Administration) Act, 2015 and section 79 of the Public Finance Management Act.

6. The Petitioners submit that these provisions place a huge burden on the 1st Respondent to conduct a needs assessment for the respective courts, prior to the declaration of vacancies in those courts by the Chief Justice. They argue that in failing to do so, the 1st Respondent abdicated its responsibility, and is attempting to pass off recommendations from the President of the Court of Appeal, the Presiding Judge of the ELC and the Principal Judge of the ELRC, as a needs assessment process and report.

7. It is the Petitioners' case that the conduct of a needs based assessment is a policy-informed step by step process that should be done with a clear guideline set by the 1st Respondent; that it involves public and stakeholder participation and should result in a formal resolution of the 1st Respondent with clear direction to the Chief Justice to declare vacancies in the office of Judge. They assert that the responsibility of conducting a needs assessment cannot be delegated to the Chief Justice or to any other Judge.

8. According to the Petitioners, the ELC cases with a subject matter of below Kshs. 20,000,000/= account for about 90 percent of the active case load, whereas the ELRC matters with a subject matter of below Kshs. 20,000,000/= account for 80 percent of the active case load. They contend that following the Chief Justice's Practice Directions made pursuant to the Magistrates' Courts Act, 2015, these cases are within the jurisdiction of the Magistrates' Courts. In their view, the Courts which need more judicial officers to promote access to justice are the Magistrates' Courts which are well distributed within the Country.

9. It was submitted that the State of the Judiciary and the Administration of Justice Annual Report, (SOJAR), 2017-2018, does not constitute a needs assessment report but merely represents an analysis of caseload per court. The Petitioners contend that the report confirms their view that Magistrates' Courts are the busiest. They therefore assert that the declaration of the vacancies in the offices of Judge of Appeal, ELC and ELRC is a contradiction of the Judiciary's own report.

10. It is their position that the Parliamentary Report by the National Assembly's Departmental Committee on Justice and Legal Affairs, titled "Report on the consideration of the 2017/2018 Report of the Judiciary on State of the Judiciary and the Administration of Justice" cannot also pass as a needs assessment process and report of the 1st Respondent. In their view, the Report does not recommend a specific number of Judges for recruitment nor does it specify reasons for appointment of any cadre or number of Judges.

11. According to the Petitioners, had the 1st Respondent conducted public participation, it would have enabled it to determine the extent of the deficiencies in access to justice, prior to the recruitment of additional judges. They contend public participation was necessary in determining the problem and prescribing the solution as it would have guided the 1st Respondent on the most optimal manner of addressing the problem. They argue that while the 1st Respondent has the mandate to nominate persons for appointment as Judges, it must to do so in consultation with other institutions.

12. They assert that the 1st Respondent cannot wriggle out of its duty to ensure public participation in the entire recruitment process by merely stating that the legal framework of the Judicial Service Act did not require it to consult the public before initiating the process of declaration of vacancies. They contend that since public participation applies to all facets of public governance, the 1st Respondent was under a duty to facilitate meaningful public participation in the appointment of Judges: determine the need for them, before the declaration of vacancies by the Chief Justice. In this respect, the Petitioners rely on the Supreme Court decision in British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 others, Petition No. 5 of 2017, [2019] eKLR

13. The Petitioners accuse the 1st Respondent of misconstruing its duty in conducting public participation by stating that it did not have to conduct one at the preliminary stage before declaration of vacancies. The Petitioners assert that, the 1st Respondent ought to have engaged the public and all stakeholders prior to declaration of the vacancies in the office of Judge at that stage since it is the foundation of the process. They aver that failure to conduct public participation at that stage resulted in a likelihood of the process setting off on the wrong tangent.

14. The Petitioners argue that public participation is at the heart of the People's sovereignty and the 1st Respondent was under a duty to ensure that the recruitment process was anchored on it. They contend that the 1st Respondent failed to inform the public of the need for additional judges and judicial officers so that the public could give an input as to which courts to prioritize in the recruitment exercise and to what extent. To that extent, they contend, the 1st Respondent ignored both quantitative and qualitative components through which it could have obtained salient statistical data on the cost-benefit analysis of the proposed appointments.

15. The Petitioners pointed out that whereas the 1st Respondent had alluded to insufficient human resource capacity as one of the challenges facing the Judiciary, there is no such information in the replying affidavit of Paul Ndemo. According to the Petitioners, the Report does not recommend the appointment of additional judges as a solution to reduction of backlog and access to justice.

16. In the Petitioners' view, the appointment of a large number of Judges to the ELC and ELRC, is not necessary since the majority of disputes filed in relation to those courts, fall within the jurisdiction of

the Magistrates' courts. To them, it would have been more economical had the 1st Respondent recruited more magistrates and not Judges.

17. The Petitioners contend that the 1st Interested Party failed to conduct a thorough reference check, background investigation and vetting with agencies such as the Ethics and Anti-Corruption Commission (EACC), the 1st Interested Party and other authorities on the suitability of the candidates for the respective positions, resulting in recommending disqualified persons.

18. With regard to the Office of Judge of the Court of Appeal, the Petitioners accuse the 1st Interested Party of conducting the exercise of shortlisting, interviewing and recommending names of persons for appointment in a manner discriminatory against members of the Law Society of Kenya, the 1st Interested Party, and other non-judge candidates.

19. The Petitioners further accuse the 1st Interested Party that it failed to take into account the adverse reports and the immense public and stakeholder outcry against some of the candidates as a result of which candidates lacking in integrity were nominated for appointment in contravention of Chapter Six of the Constitution, and Articles 166, 167 and 168.

20. They urge that the process spelt out under Article 168 of the Constitution for removal of a judge once appointed, is painstaking, lengthy and expensive and prudent management of public resources requires that where there is good reason to suspect an unconstitutionality, illegality or irregularity in the process of appointment of a judge, such appointment should be suspended or stopped altogether.

21. It is their case, therefore, that the 1st Respondent failed to take into account relevant considerations prior to recommending the 41 individuals for appointment into office of Judge. They contend that while they are not opposed to the appointment of Judges, such appointment is not an event, but a process which affects the citizenry and should, therefore, be done in accordance with the Constitution and the law.

22. The Petitioners submit that if the President were to act as a mere rubber stamp of the recommendations of the 1st Respondent in exercise of his powers to appoint judges under Article 166 of the Constitution, he would be making appointments resulting from a flawed process in violation of his duty to uphold the Constitution as stipulated under Article 131(2).

23. In the Petitioners' view, the question which begs urgent interpretation by this Court, is whether the President's power to appoint judges under Article 166 of the Constitution, is merely ceremonial, or whether he can decline to appoint and give written reasons for the decision under Article 135.

24. According to the Petitioners, the facts of the instant Petition differ from those obtaining in Law Society of Kenya v Attorney General & 2 others, Constitutional Petition No. 313 of 2014, [2016] eKLR. Their argument is that in the present Petition, there are various issues which were not in issue in the Law Society Case, namely; questions of failure to conduct a needs assessment; lack of public participation; integrity issues arising post-nomination; lack of cost-benefit analysis vis-à-vis the Judiciary budget and the President's duty to uphold the Constitution. They urge that, in any event, this court is not bound by that decision.

25. To this end, the Petitioners submit, that in construing the Constitution on a matter as weighty as separation of powers between the arms of government, the court ought to do so in a manner that promotes good governance and the rule of law guided by Article 259 of the Constitution.

26. The Petitioners, therefore, pray for:

a. A declaration that the nomination of 11 persons for appointment to the office of Judges of the Court of Appeal on 22nd July, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

b. A declaration that the nomination of 20 persons for appointment to the office of Judge of the Environment and Land Court on 13th August, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

c. A declaration that the nomination of 10 persons for appointment to the office of Judge of the Employment and Labour Relations Court on 13th August, 2019 by the 1st Respondent for appointment by the President of the Republic of Kenya is unconstitutional.

d. A declaration that the appointment by the President of the Republic of Kenya of any of the 41 persons to the office of Judge of the respective courts for which the 1st Respondent recommended them shall be unconstitutional, null, and void.

e. A declaration that the President has power to decline to appoint any person recommended by the Judicial Service Commission, if subsequent to such recommendation, issues about any such person that would otherwise disqualify such person from appointment into the office of Judge of the Republic of Kenya emerge provided that where the President declines to appoint any such person, the President shall do so in writing.

f. A declaration that the Judicial Service Commission has power to decline to recall the name of any person recommended to the President for appointment to the office of Judge of the Republic of Kenya if subsequent to such recommendation by the Judicial Service Commission, issues about any such person that would otherwise disqualify such person from appointment into the office of Judge of the Republic of Kenya emerge.

g. Any other alternative remedy this Honourable Court will deem just and fit to grant.

h. Costs of this Petition.

The 2nd Respondent and the 3rd Interested Party's Case

27. The Attorney General, the 2nd Respondent, is sued in his capacity as the principal legal advisor to the national government pursuant to Article 156 of the Constitution, while the Cabinet Secretary for the National Treasury and Planning, the 3rd Interested Party, is mandated to inter alia formulate, implement and monitor macro-economic policies involving expenditure and revenue. The 2nd Respondent and the 3rd Interested Party, support the Petitioners' position in this petition.

28. The 2nd Respondent and the 3rd Interested Party did not file responses, but made oral submissions in support of the petition. In their oral submissions, they echoe the Petitioners' submissions, asserting that the decisions of the 1st Respondent are not absolute; are reviewable and that the court ought to consider them against the provisions of Article 10 of the Constitution. They rely on Article 161 of the Constitution on the composition of the Judiciary, to submit, that the 1st Respondent is not part of the Judiciary and cannot, therefore, refer to a report made by the President of the Court of Appeal, who is neither its member nor agent.

The 1st Respondent's Case

29. Judicial Service Commission, the 1st Respondent, is a constitutional Commission established under Article 171(1) of the Constitution, to promote and facilitate the independence and accountability

of the judiciary and the efficient, effective and transparent administration of justice. It opposes the Petition through a replying affidavit sworn by Paul Ndemo, the Deputy Chief Registrar of the Judiciary on 9th December, 2019 and written submissions of even date.

30. According to Mr. Ndemo's deposition, the 1st Respondent, is unique in its membership and composition, as it was designed by the framers of the Constitution, to have representation from the Judiciary, Attorney General, two representatives appointed by the President to represent the public, a nominee of the Public Service Commission and representation from the statutory body responsible for the professional regulation of advocates, to safeguard the independence of the Judiciary. He asserts that under Articles 248 and 249 of the Constitution, the 1st Respondent is an independent constitutional body subject only to the Constitution and the law, and not subject to direction or control by any person or authority.

31. In the affidavit, Mr. Ndemo deposes that the Petitioners' claim that the 1st Respondent failed to conduct a needs assessment is not only false, but is also out of touch with the current predicament facing the administration of justice in the country. He states that there has been an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC, as detailed in the annual State of the Judiciary Reports (SOJAR) filed before National Assembly and presented to the President.

32. Mr. Ndemo deposes that in the 2017-2018 Report, insufficient human resource capacity was flagged as one of the challenges facing the Judiciary, and the need for human resource capacity improvement, especially the appointment of optimal number of judges and hiring magistrates.

33. It is the 1st Respondent's case that the National Assembly Departmental Committee on Justice and Legal Affairs, considered the report and in its report dated 9th May, 2019, observed that the current 32 Judges in the ELC and 12 Judges in the ELRC, are inadequate to expeditiously deal with cases in those courts. He argues that after considering the challenges faced by the Judiciary, on 9th May 2019, the Committee recommended to the full House that the National Treasury, should allocate adequate resources to enable the Judiciary appoint more Judges and hire more Magistrates for expeditious determination of cases.

34. Mr. Ndemo is of the view, that the needs assessment undertaken by the Judiciary and the 1st Respondent, is a process and not an event. He asserts that in determining the need to appoint Judges, the 1st Respondent consults widely, considers reports from the Judiciary, including the SOJAR, requests from various courts across the country all of which include views and concerns of the public regarding the shortage of judges.

35. It is the 1st Respondent's case that the Petitioners' contention that it had not taken into account the fact that the bulk of cases are handled by Magistrates' Courts, is misplaced since most disputes filed before the ELC involve parcels of land in urban and semi urban areas whose values exceed the pecuniary jurisdiction of Magistrates' Courts. The 1st Respondent pointed out that the Presentation made in January 2019 by the Presiding Judge of the ELC confirmed the urgent need for the appointment of additional judges to handle cases. It also contends that the Petitioners do not appreciate that appeals from the Magistrates' Courts in land cases are also handled by the ELC.

36. The 1st Respondent pointed out that in January, 2019, the Presiding Judge of the ELRC made a presentation highlighting the shortage of judges as the court's biggest challenge with a total 12 Judges serving the entire country and requested for the appointment of 10 additional judges to assist the court to reduce case backlog.

37. It is the 1st Respondent's position that the Petitioner's claim that the Chief Justice violated Article 10 of the Constitution by failing to provide an opportunity for public participation in the determination

of the number of vacancies to be declared, is founded on a miscomprehension of the constitutional requirement of public participation in the appointment process. It asserts that there is no role for public participation at this preliminary stage, which is governed by paragraph 3 of Part II of the First Schedule to the Judicial Service Act. It urges that under Article 118 of the Constitution public access and participation is an imperative on Parliament and not the Judiciary.

38. The 1st Respondent contends that prior to the declaration of vacancies and the commencement of the recruitment process, the Judiciary had factored in its budgetary estimates, the recruitment of additional Judges. It refers to a letter dated 6th April, 2018 through which the Judiciary forwarded to the National Assembly, the Judiciary Programme Based Budget (PBB) for the MTEF period 2018/19 -2020/21 and the Judiciary Recurrent Budget Estimates and Projects for the Financial Years 2018/2019. In the proposed budget estimates, the Chief Registrar of the Judiciary had notified the National Assembly that the inadequate number of Judicial Officers and staff had hampered the expeditious disposal of cases. To this end, the Judiciary required more resources to establish an additional 107 court stations across the country and recruit over 2000 judicial officers and staff. It urges that neither the National Assembly nor the National Treasury objected to the proposal.

39. It is further submitted that after the declaration of vacancies, the 1st Respondent advertised vacancies in the Court of Appeal, the ELC and the ELRC, invited applications from interested parties and shortlisted applicants for interviews; that in compliance with the constitutional requirement for public participation in the appointment process, the 1st Respondent requested members of the public to submit any information of interest against any of the shortlisted candidates for consideration before making a determination.

40. The 1st Respondent submits that it wrote to various state agencies and other organisations, requesting for information and background checks for all the shortlisted applicants. These included: Ethics and Anti-Corruption Commission; The National Intelligence Service; The Judiciary Ombudsman; The Kenya National Commission on Human Rights; The Advocates Complaints Commission; The Kenya Revenue Authority; The Higher Education Loans Board; The Law Society of Kenya; Sheria Sacco Limited and Law Society of Kenya SACCO.

41. The 1st Respondent submits that it considered and deliberated upon all the reports provided by the state agencies and members of the public; that complaints were then served upon the affected candidates for their response and all these formed part of the selection criteria. According to the 1st Respondent, some of the candidates were not recommended on the basis of the adverse and particularized information received and considered by it.

42. The 1st Respondent contends that in a letter dated 5th July, 2019 the National Intelligence Service (NIS) had indicated that it had "adverse reports against some of the Applicants" but none of the alleged adverse reports were furnished nor were any particulars thereof provided to enable it put those adverse reports to the affected candidates for their responses as required by Article 47(1) of the Constitution and section 4(3)(g) of the Fair Administrative Action Act.

43. It is submitted that the 1st Respondent had in exercise of its general powers under paragraph 19 and 20 of Part VII of the First Schedule to the Judicial Service Act, 2011 extended the timelines within which the NIS was to provide particulars of the adverse reports. It gave the NIS a 7 day extension, ending on 15th July, 2019 within which to provide the particulars. The NIS did not however furnish any particulars of the allegation. Instead it responded by a letter dated 21st July, 2019 stating that "it had discharged its obligation in its first letter."

44. According to the 1st Respondent, it subjected the applicants to a rigorous vetting process, which included a comprehensive consideration of their character, integrity and professional qualifications. In its view, it discharged its mandate in accordance with the Constitution and the Judicial Service Act in recommending the 41 successful applicants for appointment as Judges.

45. The 1st Respondent contends that Part VI of the Judicial Service Act which provides for the "post nomination procedures", has no provision for the President to reject or disapprove of any of the nominees or even for the 1st Respondent to "withdraw or reconsider" the names of any of the nominees once it makes the recommendation. The 1st Respondent argues that under the Constitution and the law, the duty of the President as Head of State in the appointment of Judges is ceremonial and is only intended to formalize the appointment of the persons recommended by the 1st Respondent.

46. The 1st Respondent avers that the Attorney General, as the Principal advisor to the national government, participated in the appointment process and signified his approval of the recommendation by signing the resolution on all nominees. This was because he was satisfied that all constitutional and legal requirements in the appointment of judges had been met.

47. The 1st Respondent relies on the decision in Law Society of Kenya (supra), for the proposition that the role of the President in the appointment of persons it recommends, is merely ceremonial, and that the President's mandate as spelt out under Article 132 of the Constitution, does not include the power to vet the suitability of persons recommended for appointment as judges.

48. According to the 1st Respondent, the determination of suitability and meeting of the appropriate constitutional and statutory qualifications for appointment as Judges rests with it. It further argues that this is intended to safeguard judicial independence and for that reason, the President's duty to appoint is without discretion. The 1st Respondent relies on an article by Professor Karuti Kanyinga; "Kenya Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS)" for the observation that the Constitution has considerably altered the structure of governance, particularly; restructuring the executive; the legislature and the judiciary, including the mode of appointment of judges.

49. The 1st Respondent relies on the decision of the Constitutional Court of South Africa in Justice Alliance of South Africa vs. President of Republic of South Africa and Others (as consolidated with) Freedom Under Law vs. President of Republic of South Africa and Others and centre for Applied Legal Studies and Another v President of Republic of South Africa and Others [2012] ZACC 24 and the decision in Karuhanga v Attorney General, (Constitutional Petition Number 0039 of 2013) [2014] UGCC 13 (4 August 2014). For the proposition that the doctrine of separation of powers is a constitutional design and that this Court is empowered to intervene whenever there is an imminent threat to the Constitution.

50. It contends that the Supreme Court decision in Speaker of the Senate & Another v Hon. Attorney General & Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR addressed and contextualized the vexed question of separation of powers. Further that the Constitutional Court of South Africa had in Hugh Glenister v President of the Republic of South Africa & 11 Others, held that it is a necessary component of the doctrine of separation of powers that courts have a constitutional obligation to ensure that the exercise of power by other branches of government occurs within constitutional bounds.

51. The 1st Respondent argues that the President is under a constitutional duty to appoint the persons recommended by the 1st Respondent as judges without unreasonable delay. In its view, if the decision of the President not to appoint the persons nominated by the 1st Respondent is left unchecked, it will

erode and diminish the constitutional mandate of the 1st Respondent. It further argues that the delay has subjected the successful applicants to unwarranted speculation on their suitability as Judges of the Superior Courts.

52. With respect to public participation at the preliminary stage of declaration of vacancies, and the alleged contravention of Article 10 of the Constitution, the 1st Respondent submits that the Judicial Service Act does not contemplate or provide that the public would determine the number of vacancies to be declared by the Judiciary. It contends that the public participation expressly provided for under the Act is in the appointment process where the public is afforded an opportunity to submit to the 1st Respondent written memoranda on any information regarding the Applicants for consideration. It asserts that it satisfactorily facilitated and conducted public participation during the process of recruitment.

53. To this end, the 1st Respondent refers to the decisions inDoctors for Life International vs. Speaker of the National Assembly & Others [2006] ZACC 1; Samuel Thinguri Waruathe and 2 Others v Kiambu County Government & 2 Others [2015] eKLR and British American Tobacco Kenya PLC v Cabinet Secretary for Health & 5 Others Petition No. 5 of 2017 (unreported), where public participation as a guiding principle was the subject of constitutional interpretation.

The 1st Interested Party's Case

54. The Law Society of Kenya, the 1st Interested Party, is a body corporate established under section 3 of the Law of Society of Kenya Act to uphold the Constitution and advance the rule of law and the administration of justice, and protect and assist members of the public in matters relating to or ancillary and incidental to the law. The 1st Interested Party joined the 1st Respondent in opposing the Petition. It filed written submissions dated 16th December, 2019, echoing the position adopted by the 1st Respondent in every respect.

55. The 1st Interested Party urges that to begin with, this Court lacks jurisdiction to hear and determine the instant Petition since it seeks an abstract interpretation of the Constitution, which is not permitted by Article 165(3) thereof. It contends that the Petitioners cannot purport to bring this Petition under Articles 22(1), 23(1) and 165(3) (b) of the Constitution, for enforcement of fundamental rights and freedoms, when there is no threat to fundamental rights and freedoms. It also argues that the Petition is an abuse of court process and is brought in bad faith, as there is no controversy for the court to resolve. It notes that although the totality of the Petition is to declare the recommendation of the 41 persons nominated for appointment to the office of Judge unconstitutional, it does not raise a justiciable controversy.

56. According to the 1st Interested Party, the Petitioners' claim that the process employed by the 1st Respondent in arriving at the names of the persons recommended to the President for appointment as judges was unconstitutional, illegal, irregular, fatally defective, null and void for which the court needs to urgently intervene, is not supported by relevant provisions of the constitution and statute claimed to have been violated. It asserts that the Petitioners failed to demonstrate how Article 166(1) (b) of the Constitution, on which appointment of Judges is anchored, has been violated or threatened with violation.

57. In its view, the Petitioners want this court to stop the President from carrying out a constitutionally ordained mandate without explaining how, if at all, paragraph 16 of the First Schedule to the Judicial Service Act, is unconstitutional. It argues that the Petition is incompetent since the Petitioners have not demonstrated what the appointment process entails or how the process was marred with failures.

58. It is the 1st Interested Party's position, that courts have held that in cases concerning the enforcement of fundamental rights and freedoms under the Bill of Rights, and enforcement of the Constitution, a party seeking the court's relief must plead his case with precision, failure to which the court should decline jurisdiction as it cannot engage in an academic or hypothetical exercise. It refers to the decision in John Harun Mwau & 3 Others v Attorney General and 2 Others Petition No, 65 of 2011, where the court agreed with the dicta in Republic v Truth Justice & Reconciliation Commission & Another ex parte Augustine Njeru Kathangu and 9 Others, Nairobi Misc. App. No. 490 of 2009 (unreported), that an applicant has to clearly set out the acts or omissions that, in his or her view, contravene the Constitution; specify the provisions that those acts or omissions contravene and the prayers or reliefs sought. On this basis, it asks the court to decline jurisdiction in this matter

59. The 1st Interested Party reiterated the Petitioners' submission that the 1st Respondent is not required by law to conduct mandatory needs assessments before declaring vacancies to the office of Judge. It asserts that both section 4(3) of the Court of Appeal (Organization and Administration) Act, 2015 and section 4(3) of the High Court (Organization and Administration) Act, 2015, which provide for a judicial needs assessment, are not couched in mandatory terms as they employ the use of the word "may."

60. The 1st Interested Party submits that public participation is an integral part of the process in judicial appointments and has 3 levels, namely; the composition of the 1st Respondent as stipulated under Article 171(2) of the Constitution; the selection process of nominees to the position of judge, and the Parliamentary vetting of nominees to the Office of Chief Justice and Deputy Chief Justice.

61. The 1st Interested Party agrees with the 1st Respondent, that Article 166(1)(b) of the Constitution is in mandatory terms, that the President shall appoint all other Judges in accordance with the recommendation of the 1st Respondent. It also refers to paragraph 16 of the First Schedule to the Judicial Service Act which provides that the 1st Respondent shall not reconsider its nominees after the names are submitted to the President except in the case of death, incapacity or withdrawal of a nominee. This, it says, is an essential inbuilt constitutional safeguard to the independence of the 1st Respondent. It also supports the 1st Respondent's submission, that the role of the President in the appointment of judges is ceremonial.

62. In the 1st Interested Party's view, this court is bound to take into account the reason that the drafters of the Constitution deemed it fit to designate a robust, independent, impartial, competent and capable commission to protect and promote the independence of judiciary. It urges that the Constitution is the supreme law of the land, binding all persons and all state organs at either level of government and any act or omission in contravention of the Constitution is therefore invalid.

63. Relying on the decision in Equity Bank Limited vs. West Link Mbo Limited Civil Application NO. 78 of 2011 [2013] eKLR, it submits that the theory of holistic interpretation of the Constitution requires an interpretive approach that takes into account, alongside a consideration of the text and other provisions in question, non-legal phenomenon such as Kenya's historical, economic, social, cultural and political context.

64. The 1st Interested Party submits that this petition presents the clearest instance of abuse of the court process to achieve collateral purposes, other than the genuine enforcement of the Constitution and prays for its dismissal, with costs.

2nd Interested Party's Case

65. The Salaries and Remuneration Commission, the 2nd Interested Party, is an independent constitutional Commission established under Article 230 of the Constitution to, inter alia, set and regularly review the remuneration and benefits of all state officers. It did not file any response or submissions to the petition and left the matter to the court.

Analysis and Determination

66. We have considered this petition, the supporting affidavit, the replying affidavit as well as the rival submissions. In our view, the following issues arise for determination:

    i. Whether this court has jurisdiction to hear and determine this petition

    ii. Whether the 1st Respondent was required to conduct needs assessment before declaration of vacancies

    iii. Whether there was need for public participation before declaration of vacancies

    iv. Whether this court should restrain the President from appointing persons recommended

Whether the court has jurisdiction

67. The Petitioners filed this petition to challenge the process employed by the 1st Respondent in arriving at the names of persons recommended to the President for appointment as judges, which they allege was unconstitutional, illegal, irregular, fatally defective and null. The petition, therefore, seeks to declare the recommendation of the 41 persons for appointment to the office of Judge, unconstitutional. As a consequence, it also seeks to restrain the President from appointing them to the respective positions as recommended.

68. The 1st Respondent argues that it followed the Constitution and the law in the declaration of vacancies, invitation of applications from interested parties, shortlisting of applicants, conducting interviews and recommending successful applicants for appointment. In particular, the 1st Respondent states that it complied with the constitutional requirements for public participation in the appointment process.

69. The 1st Interested Party contends that the petitioners' averments are not supported by relevant provisions of the Constitution or statute said to be violated. It asserts that the petition does not raise a justiciable controversy for the court's determination, and that the petition as drawn and filed, does not show how Articles 22(1), 23(1) and 165(3) (b) and (d) of the Constitution have been violated, to support the prayers sought. In its view, this court does not have jurisdiction to entertain a non-justiciable matter.

70. This argument is not a novel one. This being a petition challenging a constitutional process, it is important that the court considers the petition holistically before making a determination on the issues raised therein.

71. Moreover, Article 165(3) (d), grants this court jurisdiction respecting the interpretation of the Constitution, including the determination of the question whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution. On our part, looking at the totality of the petition, it alleges that the 1st Respondent acted in contravention of the constitution, which is a question for this court's determination.

72. In any event, the Court of Appeal, (Musinga JA), stated in Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR, that:

> (52) "Every provision of the Constitution must be construed according to the doctrine of interpretation that the law is always speaking, thus there cannot be a legal void, a situation where the court is unable to grant a justiciable relief because of interpreting the law pedantically and concluding that it has no jurisdiction to grant such an order."

73. We therefore find and hold that this court has jurisdiction to hear and determine this petition.

Whether the 1st Respondent was required to conduct needs assessment before declaration of vacancies

74. The Petitioners contend that the 1st Respondent did not conduct a needs assessment on the complement of judicial officers in terms of courts and cadre before it gazetted vacancies; advertised, interviewed and recommended names of persons to be appointed into the office of Judge. This, they argue, would have determined the optimal number of judicial officers needed for the office of Judge of Appeal, Judge of the ELC and Judge of the ELRC. They, therefore, opine, that this violated Articles 10, 172 and 201 of the Constitution; section 4(3) of the Court of Appeal (Organization and Administration) Act; Section 4(3) of the High Court (Organization and Administration) Act; section 5 of the Employment and Labour Relations Act and Section 79 of the Public Finance Management Act.

75. Article 10 (1) on national values and principles provides that:

> " The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
>
> (a) applies or interprets this Constitution;
>
> (b) enacts, applies or interprets any law; or
>
> (c) makes or implements public policy decisions"

76. Under Sub Article (2), the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; (c) good governance, integrity, transparency and accountability; and (d) sustainable development and Culture. Transparency, accountability and public participation, are founding values in our Constitution.

77. Section 4(3) of the Court of Appeal (Organization and Administration) Act requires the 1st Respondent to determine the optimal complement of Judges in the Court of Appeal, to declare vacancies, recruit and recommend persons for appointment as Judges of the Court of Appeal. The section states thus:-

> " (3) Despite subsection (1)(b), the Commission may, from time to time, conduct or cause to be conducted a judicial needs assessment and recommend the appropriate number of judges required for appointment to the Court" (emphasis)

78. The Petitioners contend that the 1st Respondent is obligated to determine vacancies and recommend names for appointment into the offices of Judge of the ELC and ELRC, only after conducting a needs assessment in accordance with the above provisions, and in keeping with international best practices.

79. The Petitioners further argue that section 5(1) (b) of the Employment and Labour Relations Act, requires the 1st Respondent to determine the complement of Judges to be appointed into the office of Judge of the ELRC. The Section provides:-

> "(1) The Court may consist of—
>
> (a) The Principal Judge; and
>
> (b) Such number of Judges as may be determined and recruited by the Judicial Service Commission and appointed in accordance with Article 166(1) of the Constitution."

80. Similarly, section 5 of the Environment and Land Court Act 2012 provides:-

> "The Court shall consist of the Presiding Judge and such number of Judges as may be determined by the Judicial Service Commission from time to time." (Emphasis)

81. From the aforesaid sections, the 1st Respondent is required to determine the optimal number of Judges for appointment in accordance with Article 166(1)(b) of the Constitution.

82. The Petitioners' contention is that in spite of clear provisions of the law placing an obligation on the 1st Respondent to conduct a needs assessment for the respective courts, as a condition-precedent before declaration of vacancies in all offices of Judge, it abdicated this responsibility and is trying to pass off recommendations from the President of the Court of Appeal, the Principal Judge of the ELRC and the Presiding Judge of the ELC as a needs assessment process and report. In their view, the responsibility of conducting a needs assessment cannot be delegated to the Chief Justice or any other Judge.

83. The 1st Respondent's response is that the Petitioners' claim that it did not conduct a needs assessment is not only false, but is also out of touch with the current predicament facing the administration of justice in the country. It argues that there is an acute shortage of Judges in the Court of Appeal, the ELC and the ELRC as detailed in the SOJAR that was filed before the National Assembly and presented to the President.

84. According to the 1st Respondent, the 2017-2018 Report highlighted insufficient human resource capacity as one of the challenges facing the Judiciary and, therefore, the need for human resource capacity improvement through appointment of optimal number of judges and hiring magistrates respectively. The 1st Respondent argues that the National Assembly Departmental Committee on Justice and Legal Affairs considered the report and observed that the current 32 Judges in the ELC and 12 Judges in the ELRC, are inadequate to expeditiously deal with cases in those courts. The Committee recommended that the National Assembly and the National Treasury do allocate adequate resources to enable the Judiciary appoint more Judges and recruit Magistrates.

85. We have considered the rival arguments on this issue. It is clear from the record that in 2016, the then President of the Court of Appeal, now the 2nd Respondent in this petition, recommended to the 1st Respondent, the appointment of not less than 6 judges to that court. He pointed out then, that a number of judges in that court were due to retire. His successor, and the current President of the Court reiterated the need for hiring of more judges intimating, that by December 2019, the complement of judges in that court would be down to 15.

86. Similarly, the Principal Judge and the Presiding Judge of the ELRC and ELC respectively, submitted reports to the 1st Respondent showing that those courts needed more judges for their optimal performance given the caseload in each court.

87. What we are required to consider, therefore, is whether the 1st Respondent is bound by law to conduct mandatory needs assessment before declaring vacancies in the office of Judge. The Petitioners, the 2nd Respondent, and 3rd Interested Party have argued that it is mandatory, while the 1st Respondent and 1st Interested Party maintain that it is not mandatory to carry out needs assessment at the preliminary stage

88. Our understanding of needs assessment is that it is a process undertaken to enable one address a gap between an existing condition and the desired situation.

89. We have looked at section 4(3) of the Court of Appeal (Organization and Administration) Act, section 5(1) of the ELRC Act and section 5 of the ELC ACT. The words used in the Court of Appeal Act are "The commission may from time to time conduct or cause to be conducted a judicial needs assessment." On the other hand, the ELRC Act and ELC Act, do not provide for needs assessment. They provide for such number of judges as may be determined by the 1st Respondent and appointed in accordance with Article 166(1) of the Constitution.

90. We find, first, that the Court of Appeal (Organization and Administration) Act is not couched in mandatory terms, as the word used is "may" and therefore, does not impose a mandatory requirement on the 1st Respondent to conduct a needs assessment as a condition precedent to appointment of Judges as urged by the Petitioners. Second, even where a needs assessment is to be conducted, the Act does not provide for the manner in which it must be done.

91. Having considered the rival arguments and the law on the issue, we find and hold that there is no mandatory requirement for the 1st Respondent to conduct a needs assessment before declaring vacancies in the office of judge. That notwithstanding, we also find that the 1st Respondent conducted a needs assessment when it called for reports from the leadership that manages the respective courts, which informed the optimal number of judges to appoint.

Whether there was need for public participation before declaration of vacancies

92. The Petitioners plead in the petition that the 1st Respondent denied the general public, the 1st, 2nd and 3rd interested parties and other stakeholders, an opportunity to engage in public participation in determining the number of vacancies required to be filled before publishing and declaring the vacancies

93. The Petitioners further contend that the 1st Respondent contravened Article 160(3) of the Constitution which provides that salaries and benefits payable in respect of Judges, is a charge on the Consolidated Fund and, therefore, requires participation of all relevant agencies in national planning.

94. They cite the decision inBritish AmericanTobacco Kenya PLC v Cabinet Secretary for Health & 5others, Petition No. 5 of 2017, [2019] eKLR, where the Supreme Court observed that public participation and consultation, is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people.

95. The Petitioners' contention, therefore, is that public participation applies to all facets of public governance and as such, the 1st Respondent was under an obligation to facilitate meaningful public participation in the recruitment of Judges right from the point of determining the need for additional Judges, before declaring the vacancies.

96. The 1st Respondent and the 1st Interested Party do not agree with the Petitioners' contention, terming it incorrect and untrue. They assert that there was no need to conduct public participation in order to determine the need for additional judges, since that is the mandate of the Chief Justice and the 1st Respondent. They argue that public participation comes in at the point of interviewing the applicants as required by the Constitution and the Judicial Service Act and not otherwise. They hold the view, that there is no constitutional or legal requirement for public participation at the preliminary stage, before declaration of vacancies in the office of judge.

97. As we have already stated elsewhere in this judgment, Article 10 provides for the national values and principles of governance which are binding on all State organs, State officers and public officers, when interpreting the Constitution, applying or interpreting or enacting any law, or making or implementing public policy. Sub Article (2) provides for the national principles which include; Patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and Sustainable development.

98. Public participation is, therefore, a founding principle in our Constitution as an element of transparency and accountability. Through public participation, the public takes part in the governance of the country. In British AmericanTobacco Kenya PLC v Cabinet Secretary for Health & 5others, Petition No. 5 of 2017, [2019] eKLR, the Supreme Court underscored the importance of public participation, thus:

> " [96]... we would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the governance they have delegated to both the National and County governments..."

99. In Matatiele Municipality and Others v President of the Republic of South Africa and Others (2) (CCT 73/05) [2006] ZACC 12; 2007 (1) BCLR 47 (CC), the Constitutional Court of South Africa was clear that:

> " The nature and the degree of public participation that is reasonable in a given case will depend on a number of factors. These include, the nature and the importance of the legislation and the intensity of its impact on the public. The more discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interest, the more reasonable it would be to expect the legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."

100. In Samuel Thinguri Waruathe and 2 Others v Kiambu County Government & 2 Others [2015] eKLR, the Court observed that;

> " Public views ought to be considered in the decision making process and as far as possible the product of the legislative process ought to be a true reflection of the public participation so that the end product bears the seal of approval by the public. In other words the end product ought to be owned by the public."

101. The Supreme Court made it clear in British American Tobacco Kenya Ltd v Cabinet Secretary for Health & 5 others (supra), that as constitutional principle under Article 10(2), public participation

applies to all aspects of governance; the public officer and/or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation; that lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; that the onus is on the public entity to give effect to this constitutional principle using reasonable means; that Public participation must be real and not illusory; that it is not a cosmetic or a public relations act; that it is not a mere formality to be undertaken as a matter of course just to fulfill a constitutional requirement, and that there is need for both quantitative and qualitative components in public participation.

102. The Supreme Court further stated that Public participation is not an abstract notion; it must be purposive and meaningful; Public participation must be accompanied by reasonable notice and reasonable opportunity. According to the Supreme Court, reasonableness will be determined on a case to case basis; Public participation is not necessarily a process constituting of oral hearings, but written submissions can also be made. The fact that someone was not heard is not enough to annul the process.

103. It is important to appreciate that the Supreme Court was clear that allegations of lack of public participation do not automatically vitiate the process. Such allegations have to be considered within the peculiar circumstances of each case, and that the mode, degree, scope and extent of public participation is to be determined on a case to case basis.

104. Article 171(2) of the Constitution provides for the composition of the 1st Respondent. This consists of, the Chief Justice who is appointed with the approval of the National Assembly, one Supreme Court Judge, one Court of Appeal Judge, one High Court Judge and one Magistrate, the Attorney-General, two advocates, one person nominated by the Public Service Commission and one woman and one man to represent the public. The latter two are appointed by the President with the approval of the National Assembly. We note that the composition of the 1st Respondent no doubt, represents some form of public participation.

105. We say so, because representatives of judges of the Supreme Court, the Court of Appeal, the High court and Magistracy and the Law Society of Kenya to the 1st Respondent, are elected by their respective peers, which brings in an element of public participation. The Chief Justice and the Attorney General are members by virtue of their offices. The Attorney General is the Principal Legal Advisor to the National government and represents national government interests in the 1st Respondent. The representative from the public Service Commission and the persons appointed by the President, also represent public interest. In that respect, the composition of the 1st Respondent is a product of public participation and they act in the public interest.

106. Appointment of Judges is a constitutional and legal process. The mandate to recommend persons for appointment to the office of judge, is bestowed on the 1st Respondent by Article 166(1) as read with Article 172(1)(a). The Judicial Service Act provides for the process to be followed in the recruitment of judges. Paragraph 3 of Part II of the First schedule to the Act provides:

> " (i) Where a vacancy occurs or exists in the office of a judge, the Chief Justice shall within fourteen days place a notice thereof in the Gazette and the Commission shall thereafter-
>
> (a) post a notice on its website;
>
> (b) send notice of the vacancy to the Law Society of Kenya and any other lawyers' professional associations; and
>
> c. circulate the notice in any other appropriate manner.

(ii) The advertisement and the notice referred to in paragraph (1) shall-

a. describe the judicial vacancy;

b. state the constitutional and statutory requirements for the position;

c. invite all qualified persons to apply;

d. inform interested persons how to obtain applications; and

e. set the deadline for submission of application which period shall not be less than twenty-one (21) days after the announcement of the vacancy by the Commission."

107. Paragraph 6 of the Schedule requires the 1st Respondent to conduct an initial review within 14 days of the deadline for the receipt of applications to confirm conformity with the necessary requirements, while paragraph 7 provides that the 1st Respondent should within 21 days of the initial review, verify and supplement information provided by the applicants by communicating to all references and former employers who should be asked to comment on the applicants' qualifications.

108. Under paragraph 8, the 1st Respondent is required within 30 days of the reference check, to investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant's professional and personal background for information that could pose a significant problem for the proper functioning of the courts, should the applicant be appointed.

109. Section 30, on the appointment of judges, provides as follows:-

"(i) for the purposes of transparent recruitment of judges, the Commission shall constitute a selection panel consisting of at least five members.

(ii) the function of the selection panel shall be to shortlist persons for nomination by the Commission in accordance with the First Schedule.

(iii) the provisions of this section shall apply to the appointment of the Chief Justice and Deputy Chief Justice except that in such case, a person shall not be appointed without the necessary approval by the National Assembly.

(iv) members of the selection panel shall elect a Chairperson from amongst their number.

(v) subject to the provisions of the First Schedule, the selection panel may determine its own procedure."

110. We have considered the Petitioners' arguments and those of the 1st Respondent and the 1st Interested Party on this issue. We have also considered the constitutional provisions on public participation and the decisions relied on. Further still, we have perused the statutory provisions that guide the 1st Respondent in determining needs of the courts, declaring vacancies, calling for applications and conducting interviews before recommending persons for appointment as judges. The Petitioners' challenge is not on the process of recruitment, per se, but that there was no preliminary public participation prior to the declaration of vacancies in the office of judge in the respective courts.

111. In our considered view, we do not think the Constitution and the law require the 1st Respondent to conduct public participation prior to declaration of vacancies whenever there is need to recruit judges

or judicial officers. The 1st Respondent, as a State organ, exercises its mandate on behalf of the people of the Republic of Kenya.

112. Our reading of the Judicial Service Act, more particularly, Section 30, Paragraph 3 of Part II of the First Schedule, Paragraphs 6, 7 and 8 of the Schedule, is that public participation is a mandatory requirement after declaration of vacancies, and not at the preliminary stage before declaration of the vacancies.

113. We have also considered the nature of the function of the 1st Respondent vis a vis the Petitioners' submissions. We note that the petitioners have not demonstrated the purpose public participation would have served at the preliminary stage before declaration of vacancies. The Judicial Service Act does not also contemplate or provide that the public would determine for the Judiciary the number of vacancies to be declared.

114. The public participation expressly provided for under the Act, is in the appointment process, where the public is given ample opportunity to submit to the 1st Respondent any information regarding the Applicants to be considered, before the 1st Respondent makes its recommendation to the President. The specific provision for public participation in the appointment process sufficiently provides for public participation and failure to do so at the stage of declaration of vacancies, does not vitiate the process. Lack of public participation at that stage, must be considered within the specific circumstances and provisions under the Act.

115. In compliance with the statutory requirement, the 1st Respondent has demonstrated that it requested members of the public to submit any information of interest against any of the shortlisted applicants for consideration. Further, by letters dated 29th April 2019, it requested the relevant professional bodies and government agencies, to conduct background checks on all shortlisted applicants and submit to it their findings for consideration and action. In the circumstances, we find and hold that the 1st Respondent complied with the Constitution and law on this issue.

Whether the court should restrain the President from appointing persons recommended

116. The Petitioners, supported by the 2nd and 3rd Respondents, have argued that the President's power on appointment of Judges under Article 166(1) is not merely ceremonial. In their view, the President can decline to appoint the recommended persons and provide reasons in writing under Article 135. The Petitioners urge that the President has sworn under Article 131(2) to adhere to and defend the Constitution. It is their contention that if in the process of appointment of Judges, the Constitution has been disregarded, or an appointment may lead to a contravention of the Constitution, then the President cannot condone, ignore or acquiesce in such violation.

117. The 1st Respondent and 1st interested Party on their part, contend that the role of the President in the appointment of judges is ceremonial. In their view, the Presidential mandate as spelt out under Article 132 does not include the power to vet the suitability of persons recommended by the 1st Respondent for appointment as judges. They assert that the mandate to determine the suitability of the persons to recommend for such appointment rests with the 1st Respondent. They also contend that if the people of Kenya intended to confer on the President discretion to decide who to appoint as judge or not, they would have done so in Article 132. They urge that failure by the President to formalize the appointments violates Article 131 (2).

118. This issue has two limbs. First; whether this court can restrain the President from discharging mandatory constitutional obligations, and second, whether the Constitution and the law allow post nomination reconsideration. We have considered the rival arguments by parties herein on this issue, the constitutional mandate of the President and that of the 1st Respondent on the appointment of judges.

119. Article 172(1) provides that;

> " The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—
>
> a. recommend to the President persons for appointment as judges..."

120. Similarly, Article 166(1) provides that;

> " The President shall appoint—
>
> (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
>
> (b) all other judges, in accordance with the recommendation of the Judicial Service Commission..." (Emphasis ours)

121. The Constitution states in mandatory terms, that the 1st Respondent shall recommend persons for appointment as judges and the President shall appoint them as recommended by the 1st Respondent. The Constitution does not donate mandate to the President to perform any other act in this regard, upon receipt of the names recommended by the 1st Respondent, except to appoint them.

122. Article 249(2) provides that commissions and the holders of independent offices are subject only to the Constitution and the law; and are independent and not subject to direction or control by any person or authority. This independence clause is intended to safeguard the independence of the 1st Respondent, as a commission and that of the judiciary. For that reason, without more, the President's duty to appoint is without discretion.

123. The Petitioners' argument that the President's role in the appointment of judges cannot be merely ceremonial because the 1st Respondent remits to him reports on the process of recruitment of Judges, has no constitutional or legal foundation. The 1st Respondent, while forwarding to the President the names recommended for appointment and the reports, discharges its constitutional mandate and that cannot be interpreted as conferring on the President any discretion to reject, review, or decline to appoint any of the persons so recommended. We therefore find that the Petitioners' argument has no merit.

124. We turn to consider the second limb, that the President has power to reject any of the names recommended for appointment, if subsequent to recommendation, issues arise that would otherwise have disqualified such a person. The Petitioners argue that the President has received adverse reports on some of the persons recommended to him by the 1st Respondent for appointment as judges. For that reason, they maintain, the President has discretion to decline to appoint the affected persons.

125. The Petitioners contend, that the process spelt out under Article 168 for removal of a Judge once appointed, is painstaking, lengthy and expensive. In their view, prudent management of public resources requires that where there is good reason to suspect unconstitutionality, illegality or irregularity in the process of appointment of a Judge, such appointment should either be suspended or stopped all together. They blame the 1st Respondent for failing to withdraw the names of persons it recommended for appointment as Judges despite adverse reports against them.

126. According to the Petitioners, if the President were to act as a mere rubber stamp and conveyor belt of the recommendations of the 1st Respondent, in exercise of his powers to appoint Judges under Article 166 of the Constitution, he would be in violation of his duty to uphold the Constitution as required by Article 131, by making appointments where some of the persons recommended, face adverse reports.

127. In their view, the facts of the instant petition are different from those inLaw Society ofKenya vs Attorney General and 2 others, (supra). They urge the court to distinguish the facts of the two petitions. They assert that since the current petition raises the question of integrity arising post-nomination, and the President's duty to uphold the Constitution, this was not an issue in the Law Society Case (supra).

128. The 1st Respondent's take is that the court should boldly interpret and give effect to the Constitution and affirm the limited role contemplated for the President in the appointment of judges in the new constitutional dispensation. The 1st Respondent further argues that, while the doctrine of separation of powers is a constitutional design the court is empowered to intervene whenever there is an imminent threat to the Constitution. It relied on among others, the decision of Speaker of the Senate & another v Attorney General & others (supra).

129. The 1st Respondent maintains that the President is under a constitutional duty to appoint persons it recommends as judges. In its view, if the decision by the President not to appoint the persons recommended is left unchecked, this will erode and diminish its constitutional mandate. This view is fully supported by the 1st Interested Party, which contends that the Petitioners want to stop the President from discharging a constitutional mandate.

130. We have anxiously considered the arguments on this limb. As we have already stated, Article 166(1)(b) provides for the role of the President in the appointment of Judges of the Superior Courts. The Article is express and mandatory that the President shall appoint all other Judges in accordance with the recommendation of the 1st Respondent. The above provision is an essential inbuilt check in the architecture of the Constitution to safeguard the independence of the 1st Respondent and the Judiciary.

131. We further note, that paragraph 16 of the First Schedule to the Judicial Service Act, provides that the 1st Respondent shall not reconsider its nominees after the names are submitted to the President, save in the case of death; incapacity or withdrawal of a nominee. Similarly, this is a safeguard to ensure that the 1st Respondent does not revisit the issue post nomination, after the names are submitted to the President for appointment under any circumstances except as provided by the law.

132. It is clear to us that Paragraph 16 which provides for "post nomination procedures does not contain the words "withdrawal or reconsideration" of the names of nominees used in the Petitioners' pleadings. Simply put, the Paragraph does not permit reconsideration of the names post recommendation.

133. We take into account the fact that the makers of our Transformative Constitution deemed it fit to designate a robust, independent, impartial, and competent organ to promote and facilitate Judicial independence and accountability.

134. In this regard, we agree with Professor Karuti Kanyinga's observation in his article; "Kenya Democracy and Political Participation: A review by AfriMAP, Open Society Initiative for Eastern Africa and the Institute for Development Studies (IDS)" (at page 61), that:

> " The Constitution has considerably altered the structure of governance, particularly by:
>
> a) restructuring the executive to be independent from the legislature;

b) establishing two houses of the legislature; and

c) establishing a very independent judiciary whose judges are hired by an equally independent Judicial Service Commission (JSC). Furthermore, all three branches of government have mechanisms through which they account to the public; they have various avenues and levels of public participation."

135. He contrasted the current Constitution with the repealed Constitution that vested executive authority in the President, which he would then exercise either directly or through subordinate officers. The President appointed judges, controlled the calendar and agenda of Parliament and controlled the public service. Such was the power of the executive.

136. Article 259(1) behoves this court to interpret the Constitution in a manner that promotes its purposes, values and principles; advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance. Further, Article 159(2) demands that in exercising judicial authority, the courts and tribunals shall protect and promote the purpose and principles of the Constitution.

137. It is clear to us, that the National Intelligence Service (NIS), in its letter dated 5th July 2019, indicated that it had adverse reports against some of the applicants. However, the adverse reports were not furnished despite the extension of time by the 1st Respondent to accommodate it, bearing in mind that the process of recruitment of judges is statutorily time bound.

138. We reiterate, that the appointment of Judges is anchored in Article 166(1)(b), as read with Article 172(1)(a) of the Constitution, which provide that Judges shall be appointed by the President in accordance with the recommendation of the 1st Respondent. We also note that under the Judicial Service Act, it is the 1st Respondent that is tasked with the mandate to determine suitability and the appropriate constitutional and statutory qualifications for persons to appoint as Judges. In that regard, the Constitution and the law contemplate no other role for the President, any other authority or body in determining the persons to appoint as judges.

139. The Petitioners have only made a general sweeping statement that the 1st Respondent contravened Chapter Six and the above Articles, and failed to "take into account glaring evidence of lack of integrity of certain candidates." The petitioners and any other person, body or authority, had an opportunity to place before the 1st Respondent evidence of lack of integrity on the part of any of the persons recommended for appointment as judge. This they failed to do.

140. We must point out here, that even if evidence of of lack of integrity or any other reason that would otherwise disqualify an applicant from being recommended for appointment as judge, was available, it is a matter that must first be placed before the 1st Respondent for its consideration and not any other State organ or State officer. It therefore cannot be an issue before this court at this stage.

141. The jurisdiction of this court, as we understand it, regarding the issues arising from the petition, is to consider the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the Constitution

142. This court does not act on mere speculation of violation or threat to violate the Constitution. There must be evidence that the threat to violate is real and imminent. That is not the position in this petition.

Conclusion

143. We have considered the petition and the arguments in support thereof. We find that the Petitioners have not demonstrated the manner in which Articles 160(3), 166, 167 and 168 have been violated, infringed or threatened with violation, to call on this court to act as they urge.

144. In the premise, we do not find merit in this petition and consequently dismiss it. Regarding costs, we are of the view that costs being discretionary, and this being public interest litigation, the appropriate order to make, as we hereby do, is that each party do bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2020.

.....

L. A. ACHODE

PRINCIPAL JUDGE

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J. A. MAKAU

JUDGE

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E. C. MWITA

JUDGE